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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 651

S. DUKE, DOING BUSINESS UNDER THE NAME AND STYLE OF
ROOSEVELT CHAIR & SUPPLY COMPANY,

Petitioner,

vs.

HERBERT A. EVEREST AND HARRY C. JENNINGS,

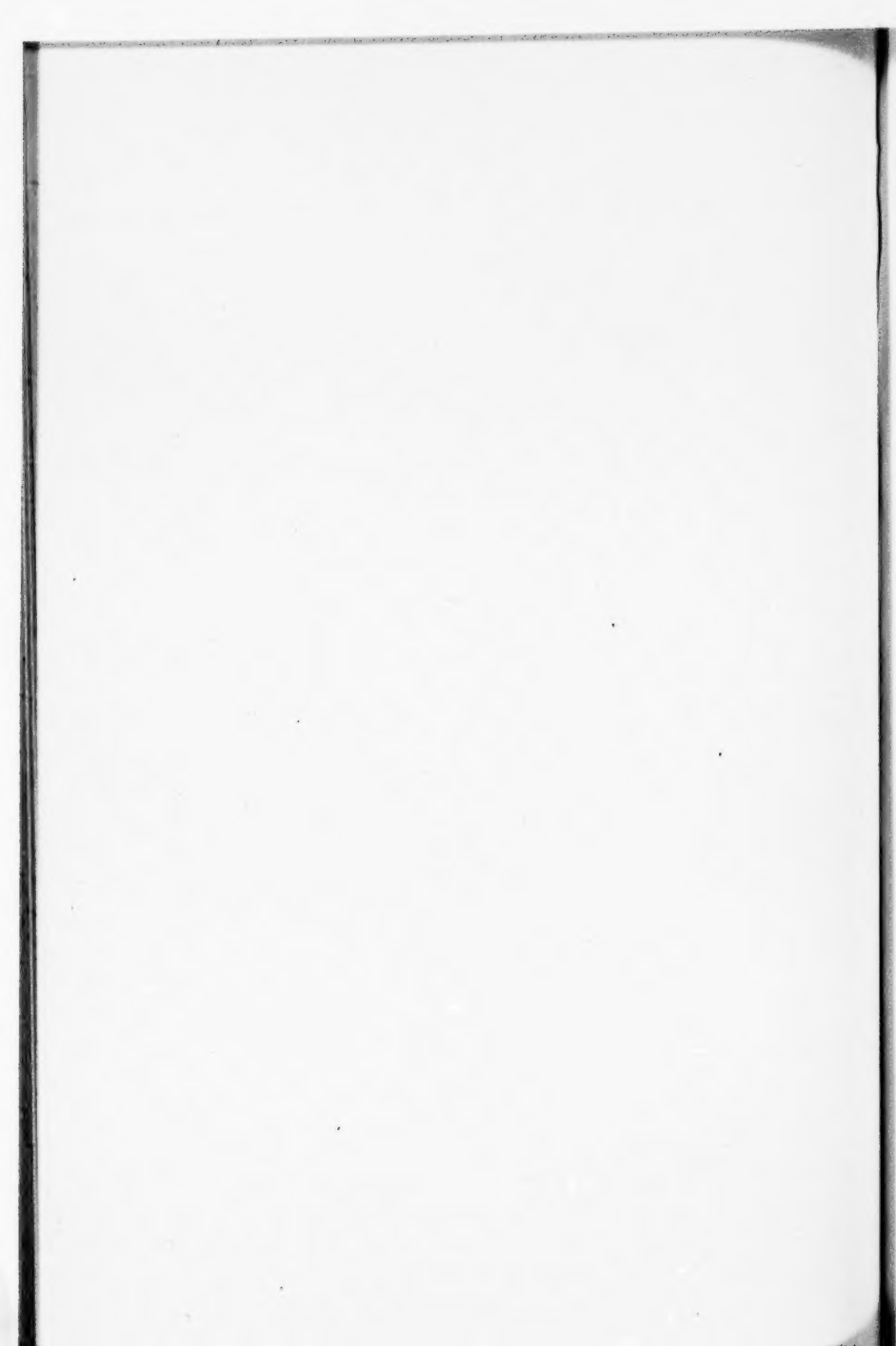
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.

CHARLES B. CANNON,

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Attorneys for Petitioner.



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HERBERT A. EVEREST AND HARRY C. JENNINGS,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION AND STATEMENT OF MATTER
INVOLVED.

Petitioner, S. Duke, doing business under the name and style of Roosevelt Chair & Supply Company, at 1220 South Michigan Avenue, Chicago, Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit (R. 226 to 232, inclusive) affirming the judgment or so-called "Interlocutory Decree" of the District Court for the Northern District of Illinois, Eastern Division (R. 137, 138, 139) entered February 1, 1943, finding claims 1, 2, 5, 6, 7, 8 and 9 of respondents' patent No. 2,095,411 on a "Folding

Wheel Chair" (R. 156 to 164, inclusive), and claim 11 of respondents' patent No. 2,181,420 on a "Folding Propulsion Wheel Chair" (R. 211 to 218, inclusive), valid and infringed by folding wheel chairs made and sold by the petitioner.

The two patents involved were issued to, and are owned by, the respondents and patentees, Herbert A. Everest and Harry C. Jennings, a copartnership, doing business as Everest and Jennings in the City of Los Angeles, California.

Both patents relate to folding wheel chairs used by invalids and are collapsible sidewise so that they may be stored in a relatively small space when not in use and so that they may be transported in a small space such as the rear seat compartment or trunk of an automobile or the like.

Each of the folding wheel chairs shown in the two patents includes a pair of upright side frames interconnected by an X-brace. The supposed advancement in the art represented by the first and earlier patent No. 2,095,411 resides in the provision of some looseness or "play" at the point of connection between the lower ends of the X-brace and the bottom horizontal side runners of the frame. The supposed advancement in the art represented by the second and later patent No. 2,181,420 resides in the provision of some looseness or "play" at the point of pivoted connection between the arms of the X-brace, rather than at the lower ends of the arms of the X-brace, as in the first patent. This looseness or "play" is supposed to allow the sides of the frames to "rack" so as to maintain both of the front driving wheels of the chair in contact with the ground or other supporting surface, over which the chair is traveling, if one front driving wheel engages an obstruction or depression in the ground, or like sup-

porting surface, so that neither of the two front driving wheels of the chair will lose tractional engagement with the ground or other supporting surface and thus prevent the invalid occupant thereof from propelling the chair.

Jurisdiction.

This is a suit arising under the Patent Laws of the United States, Judicial Code, Section 24(7), 28 U. S. C., Sec. 41.

The jurisdiction of this Court is involved under Section 2490(a) of the Judicial Code as amended by the Act of February 13, 1924 (28 U. S. C., Sec. 347).

The judgment petitioner seeks to have reviewed is dated December 14, 1943, the date of entry of the judgment in the Circuit Court of Appeals, and this petition is, therefore, timely.

The mandate has been stayed by order of the Circuit Court of Appeals to permit the filing of this petition for a writ of certiorari.

Questions Presented.

(1) Are claims 1, 2, 5, 6, 7, 8 and 9 of Everest and Jennings patent No. 2,095,411 valid and infringed by both forms of the petitioner's folding wheel chairs (the broad claim 1 of this patent being admittedly infringed, if valid)?

(2) Is the single claim 11 of Everest and Jennings patent No. 2,181,420 in issue valid and infringed by both forms of petitioner's folding wheel chairs?

(3) Did the Court of Appeals depart from the law established by this Court in the case of *McCarty v. Lehigh Valley Railroad Co.*, 160 U. S. 110, and from the established patent law laid down and followed by the Courts of Appeals of other circuits in holding that the broad claim 1 of

patent No. 2,095,411, even though not limited to a folding *wheel* chair, may, nevertheless, be saved from anticipation and invalidity by reading into the claim the title of the patent, namely, "Folding Wheel Chair" and other elements, including wheels, from the specification and drawings of the patent but which are not recited in the claim itself?

(4) Did the Court of Appeals, in holding claims 2, 5, 8 and 9 of patent No. 2,095,411 valid and infringed by both forms of petitioner's folding wheel chairs (even though petitioner's accused folding wheel chairs entirely lack the aforesaid looseness or "play" called for in these claims and which is supposed to represent the advancement of this patent in the art), depart from established principles governing invention and the rights of patentees and the public as announced by this Court in the cases of

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84; and

Atlantic Works v. Brady, 107 U. S. 192; and

(5) Did the Court of Appeals depart from established patent law in holding claims 6 and 7 of patent No. 2,095,411 valid and infringed by petitioner's folding wheel chair (Plaintiffs' Exhibit No. 1) which entirely lacks essential elements of the combination called for in these claims, namely, the small rear caster wheels (76) and the upwardly curved rear frame portions (31) from which these rear caster wheels are swiveled?

(6) Did the Court of Appeals err in interpreting claims 6 and 7 of patent No. 2,095,411 as being valid and infringed by petitioner's folding wheel chair (Defendant's Exhibit "B") even though this chair embodies a construction which is disclosed in the patent as being objectionable and admittedly old in the prior art?

(7) Did the Court of Appeals err in holding the single

claim 11 of patent No. 2,181,420, in issue valid and infringed by both forms of petitioner's accused folding wheel chairs, even though these chairs entirely lack essential elements of the combination of elements called for in this claim; and in treating this claim as though it were a patent upon the supposed single novel element of the claim (the aforesaid looseness or "play" at the point of connection between the arms of the X-brace) rather than as a combination of elements, all of which are essential, and thus give the patentees an unwarranted monopoly by judicial construction of the claim?

(8) Has the Circuit Court of Appeals decided a Federal question in a way probably in conflict with the applicable decisions of this Court so as to call for an exercise of this Court's power of supervision?

Your Petitioner believes that these questions should all be answered in the affirmative; and respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding such Court to certify and send to this Court, on a date to be designated, a full transcript of the Record and all proceedings of the Court of Appeals had in this case; to the end that this case may be reviewed and determined by this Court; that the Judgment of the Court of Appeals be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

Reasons Relied Upon for the Allowance of the Petition.

(1) There is a great and growing demand for folding wheel chairs of the character involved in this controversy, for use by invalid members of the armed forces of the United States as well as for use in government hospitals, and by the public in general. The decision of the Court of Appeals gives the respondents, by judicial construction,

an unwarranted monopoly upon the manufacture, use, renting and sale of modern folding wheel chairs throughout the remaining life of patent No. 2,095,411 (ten years) and of patent No. 2,181,420 (12 years). The effect of this will be that thousands of invalid members of the armed forces of the United States will be compelled to purchase or rent these chairs from the respondents and to pay tribute to the heavy hand of a monopoly never intended by the Patent Statutes to be granted to the respondents upon these patents but awarded by judicial construction.

(2) The Circuit Court of Appeals for the Seventh Circuit by sustaining the two Everest and Jennings patents Nos. 2,095,411 and 2,181,420, here involved, as valid and infringed, has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in the following, among other, cases:

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84;

Atlantic Works v. Brady, 107 U. S. 192, 199; and

McCarty v. Lehigh Valley Railroad Co., 160 U. S. 110.

(3) The Circuit Court of Appeals in sustaining all of the aforesaid claims of the two patents, in issue, granted the respondents a monopoly upon forms of folding wheel chairs which they expressly excluded from their own patents (as being admittedly old in the prior art and objectionable) and in so doing the Court ignored the rights of the public under these patents, and hence decided a Federal question in a way probably in conflict with the applicable decisions of this Court in

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211;

and in

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126.

(4) The petitioner and respondents are the only manufacturers in the United States of modern folding wheel chairs, of the character here involved, (see Petitioner's affidavit in the Appendix hereto). In view of this fact there is no likelihood of a different decision by any other Court of Appeals, upon either of the patents in issue, and hence for this added reason it is believed that this Court should exercise its power of supervision.

Wherefore your petitioner respectfully prays for the allowance of this petition and the grant of a Writ of Certiorari.

Respectfully submitted,

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